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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

# Decision

**Matter of:** Intertribal Bison Cooperative

**File:** B-288658

**Date:** November 30, 2001

Gene N. Lebrun, Esq., Lynn, Jackson, Shultz & Lebrun, for the protester.
Daniel S. Koch, Esq., Paley, Rothman, Goldstein, Rosenberg & Cooper, for North American Bison Cooperative, an intervenor.
Michael Gurwitz, Esq., Department of Agriculture, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

**DIGEST**

Where statute provides a specific appropriation for the Department of Agriculture to purchase bison for the Food Distribution Program for Indians on Reservations, and states that such purchases shall be made from "Native American producers and cooperative organizations without competition," a solicitation, issued by the agency contemplating a contract for such purchases that permits submission of proposals from non-Native American cooperative organizations under a competition limited to cooperative organizations, is improper.

**DECISION**

Intertribal Bison Cooperative (IBC) protests request for proposals (RFP) No. LS-80, issued by the Department of Agriculture (USDA) for the production and delivery of ground bison and bison stew meat to participants in the Food Distribution Program for Indians on Reservations (FDPIR). IBC protests that the RFP violates an applicable appropriation statute.

We sustain the protest.

The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies—Appropriations Act for fiscal year ending September 30, 2001, Pub. L. No. 106-387, 114 Stat. 1549 (2000), at Title IV, Domestic Food Programs, Food Stamp Program, stated the following:

> For necessary expenses to carry out the Food Stamp Act (7 U.S.C. 2011 et seq.), $20,114,293,000 . . .: Provided, That of the funds made available under this heading and not already appropriated to the [FDPIR] established under section 4(b) of the Food Stamp Act of 1977 (7 U.S.C. 2013(b)), not to exceed $3,000,000 shall be used to purchase bison for the FDPIR: Provided further, That the Secretary shall purchase such bison from Native American producers and Cooperative Organizations without competition . . . .

114 Stat. at 1549A-24.

Prior to issuing the RFP, the agency issued to Native American bison producers a notice that set forth the agency's intent to purchase bison products for the FDPIR, and stating that purchasing bison from Native American bison producers would be a major part of the program.[1] The agency, through designated slaughter facilities under contract with the agency, would purchase bison from qualifying Native American producers on a non-competitive basis. The notice set out the qualification requirements and the price per pound to be paid. Once qualified, a producer would deliver a specified number of bison to a designated slaughter facility for processing. Agency Report, Tab 4, Notice to Native American Bison Producers (March 2001).

The RFP, issued on June 12, 2001, contemplates the award of a fixed-priced contract to a cooperative organization on a "best value" basis, considering production capability and capacity, quality assurance program, past performance and price.[2] RFP at 11-12. The RFP states that the agency intends to award a contract to a single offeror, and that "[a]dditional awards will only be made if a single Offeror is not able to fulfill all the production and processing requirements for this program in the required time frames." RFP at 1.

The RFP's statement of work (SOW) states that the cooperative organization that receives the contract must produce ground bison products and bison stew meat. RFP, exh. B, SOW, at 1. The cooperative will produce ground bison by slaughtering live bison supplied by Native American producers under contract with USDA, which the SOW refers to as "USDA contracted bison," and blending that bison meat with "commercial" bison meat supplied by the cooperative, which the record shows is primarily, if not exclusively, from non-Native American sources. Id. at 2. The agency will pay the cooperative for the "commercial" bison meat used at a fixed price per pound as offered in the cooperative's price proposal. RFP, exh. E, Sample Cost Proposal. The final ground bison product will consist of 15 to 20 percent USDA

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[1] USDA required a Native American producer to be a member of one of the 556 Indian entities recognized by the Bureau of Indian Affairs (BIA).

[2] The RFP and the agency report misstated the applicable statute as Public Law No. 106-554. This miscitation has no effect on our decision.

contracted bison meat (that is, the bison meat obtained from Native American producers) and 80 to 85 percent "commercial" bison meat (that is, bison meat obtained non-Native American sources). Id. The SOW states that the cooperative will produce the bison stew meat entirely from "commercial" bison. RFP, exh. B, SOW, at 1; exh. E, Sample Cost Proposal.

IBC protests that the $3 million appropriated for bison for the FDPIR can only be used to purchase bison from Native American sources, whether they be producers or cooperative organizations, and thus the RFP is defective in that it solicits proposals to provide bison meat from sources that include non-Native American cooperative organizations. Additionally, under the RFP, USDA will be conducting a competition among cooperative organizations, which IBC asserts is contrary to the requirement of the statute that the bison be purchased "without competition." We agree and sustain the protest on these bases.[3]

USDA states that it interpreted the language of the statute, "shall purchase such bison from Native American producers and Cooperative Organizations without competition," to mean that USDA was to purchase bison from Native American producers, and from Native American or non-Native American cooperative organizations,[4] and that the agency was to do so without competition from other types of offerors. The agency alleges that our Office must defer to its interpretation.

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[3] The authority of our Office to decide bid protests is established by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3556 (Supp. IV 1998). CICA provides that the Comptroller General shall decide "[a] protest concerning an alleged violation of a procurement statute or regulation." 31 U.S.C. § 3552. The appropriations act at issue in this protest requires USDA to purchase bison and, in that respect, it is a procurement statute. Thus, CICA grants our Office authority to consider a protest alleging that the terms of the RFP violate the related requirements of the statute. See Department of the Air Force et al., B-253278.3 et al., Apr. 7, 1994, 94-1 CPD ¶ 247 at 7.

[4] Neither the RFP nor the agency define the term "cooperative organization." A relevant definition might be the following one provided by the Agricultural Marketing Act, 12 U.S.C. 1141j (2000):

> For purposes of this chapter, the term "cooperative association" means any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services [and which satisfies various stated conditions.]

(continued...)

In matters concerning the interpretation of a statute, the first question is whether the statutory language provides an unambiguous expression of the intent of Congress. If it does, the matter ends there, for the unambiguous intent of Congress must be given effect. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). If, however, the statute is silent or ambiguous with respect to the specific issue, deference to the interpretation of an administering agency is dependent on the circumstances. Id. at 843-45; United States v. Mead Corp., 121 S. Ct. 2164, 2171-77 (2001). Where an agency interprets an ambiguous provision of the statute through a process of rulemaking or adjudication, unless the resulting regulation or ruling is procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute, the courts will defer to this agency interpretation (called "Chevron deference").[5] Mead, 121 S. Ct. at 2171-72; Chevron, 467 U.S. at 843-44. However, where the agency position reflects an informal interpretation, "Chevron deference" is not warranted. In these cases, deference to an agency's interpretation is not mandatory, but rather the weight to be accorded an agency's judgment will depend on its relative expertness, the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, though lacking power to control. Mead, 121 S. Ct. at 2171-72; Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

Even assuming the statutory language in question here was in need of interpretation (which, as discussed below, we find is not the case), USDA's interpretation is not entitled to "Chevron deference." USDA's interpretation arose in the normal course of issuing a solicitation and is not the result of either a rulemaking or an adjudication. Nor, as discussed below, does USDA's interpretation have persuasive weight deserving of deference.

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(...continued)
While the protester asserts that it is a Native American cooperative organization because all of its members are qualified Native Americans and that the North American Bison Cooperative, which is assertedly composed of members who are not Native American, is not a Native American cooperative organization, we do not decide here what organizations may qualify as Native American cooperative organizations.

[5] There are exceptions to the rule whereby the absence of authority for an agency to use formal administrative procedures to interpret laws does not alone bar this level of deference. Mead, 121 S. Ct at 2173 n.13 (citing NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995) for the example that the deliberative conclusions of the Comptroller of the Currency as to the meaning of banking laws are deserving of this higher level of deference due to the Comptroller's specific authority to enforce such laws).

It is a fundamental canon of statutory construction that words, unless otherwise defined by the statute, will be interpreted consistent with their ordinary, contemporary, common meaning. State of California v. Montrose Chem. Corp., 104 F.3rd 1507, 1519 (9th Cir. 1997); GAO, Principles of Federal Appropriations Law, vol. 1, at 2-61 (2d ed. 1991); see Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296, 301 (1989).

Here, the statute requires USDA to use the funds appropriated to purchase bison from "Native American producers and Cooperative Organizations."[6] In this noun phrase, Congress attached the same modifier, "Native American," to the nouns "producers" and "Cooperative Organizations," separated by only the coordinating conjunction "and." Absent a separate modifier for the second noun (i.e., Cooperative Organizations), the clear implication is that both the producers and the Cooperative Organizations must be Native American. See Martha Kolln, Understanding English Grammar 241-42 (3rd ed., MacMillan Publishing Co. 1990). Moreover, under Pub. L. No. 106-387, the agency is to make such purchases "without competition." The word "without" means "with the absence, omission or avoidance of; not with; with no or none of; lacking; . . . free from, excluding." The Random House College Dictionary 1513 (rev. ed. 1980). The plain meaning of the statute thus precludes the agency from using competition when using the funds at issue here.

Thus, the plain meaning of the statute is that the bison may only be obtained from Native American sources (whether producers or cooperative organizations), and that the bison may not be obtained through competition. As discussed below, the application of other relevant tools of statutory construction does not counsel a finding that Congress intended a meaning contrary to that expressed by the plain text of the statute. Therefore, there is no basis to move beyond the plain meaning of the statutory language and replace it with the agency's contrary interpretation, regardless of the level of deference that would otherwise apply. See Chevron, 467 U.S. at 842-43; B-255548, Oct. 18, 1994 at 12 n.28; GAO, Principles of Federal Appropriations Law, vol 1, at 2-61, 2-64.

Here, the agency does not identify anything intrinsic to the statute to support its conclusion that the language is ambiguous and in need of interpretation. Rather, it suggests that, absent participation of non-Native American cooperative organizations, there may be insufficient slaughtering and processing capabilities existing among Native American sources to process the quantity of bison to be

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[6] The capitalization of "cooperative organization" first appears in the final version of the Act that was enacted into law. The legislative history does not attach any significance to and does not use the capitalized form of this term. See, e.g., H.R.. Conf. Rep. No. 106-948, at 132 (2000), reprinted in 2000 U.S.C.C.A.N. 1412, 1435-36. Nor is there any argument in the record that attaches any significance to this typographic anomaly.

purchased. Therefore, unless the statutory language is interpreted to include non-Native American cooperative organizations, the agency claims it will not be able to meet the purpose of the statute, that is to deliver bison meat in a form that is readily consumable by FDPIR participants (in the case of the RFP, that form would be ground bison meat and bison stew meat in 2-pound portions).

However, there is nothing in the Act that requires slaughtering and processing services to be performed by Native American or any other specified sources, e.g., cooperative organizations.[7] It is undisputed that the purchase of "bison" under the statute means whatever form the bison is in at the time of purchase by USDA. This could include live bison, bison carcasses, ground bison meat, or bison stew meat. As discussed above, under the statute, regardless of the form at the time of purchase, the bison is required to be purchased from Native American sources. If bison is purchased in a form that is deliverable to FDPIR participants, then the cost of slaughter and processing is included in the price of the purchased bison. However, if the bison is purchased in a form that is not deliverable to FDPIR participants, then the agency will have to incur the expense of transforming it into a deliverable form. While the agency states that such expense is not otherwise provided for under the FDPIR appropriation, we believe the expense is a necessary expense of purchasing bison for consumption by FDPIR participants. 63 Comp. Gen. 422, 427-28 (1984); 6 Comp. Gen. 619, 621 (1927); GAO, Principles of Federal Appropriations Law, vol. 1, at 4-14 to 4-28. Furthermore, since the expense for these services would arise after the bison has been purchased from Native American sources, the Act places no restrictions on the agency's acquisition of these services. Thus, where necessary, the agency may obtain slaughtering and processing services under competitive procedures using otherwise available operating appropriations (including this earmarked appropriation).

Absent USDA's perceived constraint concerning slaughter and processing capacity, the factor that appears to drive the agency's interpretation has nothing to do with the language of the statute. USDA apparently wants to include non-Native American cooperative organizations in the purchase so as to blend lower-fat Native American bison meat with higher-fat bison meat from non-Native American sources. As contemplated in the RFP, 80 to 85 percent of the ground bison and all of the stew meat purchased under this earmarked appropriation would come from these non-Native American sources. Although the agency does not assert that this scheme is contemplated by the Act, it states that, since the Act is silent on this matter, the agency has the discretion to administer this procurement in the best interests of the

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[7] We do not decide the reasonableness or propriety of the agency's position, which is disputed by IBC, that there may be insufficient slaughtering and processing capabilities obtainable from Native American sources.

FDPIR participants.[8] However, as noted, the Act is not silent on the required source of bison and there is insufficient evidence to suggest that Congress intended something other than the plain meaning of the statutory language.

Reference to the legislative history of a statute is an appropriate additional tool of analysis "with the recognition that only the most extraordinary showing of contrary intentions from such analysis would justify a limitation on the 'plain meaning' of the statutory language." Garcia v. United States, 469 U.S. 70, 75 (1984); see Chevron, 467 U.S. at 859-62. Here, the statutory history is limited, but in no way contradicts the plain meaning of the statute.[9]

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[8] USDA's position rests largely on research indicating that meat from grain-fed bison has a higher fat content and is thus more palatable than that of grass-fed (i.e., range-fed) bison. Contracting Officer's Statement at 3-4. While we do not decide this issue, the documentation in the record cited by the agency in support of this point is equivocal.

[9] The history of this provision began with an amendment to S. 2536, 106th Cong. (2000) (which concerned among other things the appropriation of the Department of Agriculture). 146 Cong. Rec. S7369 (daily ed. July 20, 2000) (amend. No. 4007). (There was no similar provision in the House bill.) The amendment in the Senate bill appropriated $7.3 million for the purchase of bison and to "provide a mechanism for the purchases from Native American producers and cooperative organizations." 146 Cong. Rec. S7369, supra. The day after the Senate adopted the amendment by unanimous consent, one of the sponsors of the amendment stated that the purpose of the amendment was to provide a healthier diet for Indian people on reservations in order to counter the ill health effects attributed to the poor diet of meat high in fat and sodium that is presently available to this population. 146 Cong. Rec. S7439-40 (daily ed. July 21, 2000) (statement of Sen. Campbell).

As noted, the statute ultimately enacted appropriated only $3 million and provided that the bison was to be purchased from "Native American producers and Cooperative Organizations without competition." The conference report addressed the changes as follows:

> The conference agreement does not include Senate language providing for an additional amount, not to exceed $7,300,000, for bison purchases for the [FDPIR]. The conferees encourage the Department to continue and increase, to the extent practicable, purchases of bison for FDPIR and to use every opportunity to acquire purchases from Native American producer [sic] and cooperative organizations. . . .
>
> The conferees recognize the severe health problems facing Native Americans, including diabetes and heart disease. The conferees expect the Secretary to purchase bison meat for the FDPIR to promote health benefits in the Native American population.

(continued...)

Another tool of statutory construction used to ascertain the intent of Congress is the review of similar or related statutes. Mallard, 490 U.S. at 305-07. Referring to such legislation here proves instructive and supports the plain meaning, as reflected in the text, of the statute in question here.

Congress has previously enacted statutes to benefit business concerns of people in socio-economic groups deemed to be disadvantaged in the competitive market place, see, e.g.,15 U.S.C. § 637(a) (2000) (section 8(a) of the Small Business Act provides for agencies to make non-competitive acquisitions to benefit socially and economically disadvantaged small businesses),[10] and has specifically authorized acquisitions limited to or favoring Native American concerns for purchases of products of Indian industry under the Buy Indian Act, 25 U.S.C. § 47 (1994).[11] In the Act at issue here, Congress intended that Native American concerns will be the source for purchasing bison to be provided to Native Americans on reservations with the earmarked dollars. Such intent is consistent with the above-cited statutes providing for non-competitive purchases from disadvantaged and Native American concerns.

There are also relevant statutes that consistently identify the meaning of the term "without competition" to mean that the government is to award contracts without using any competitive selection process. For example, under an act authorizing the Secretaries of Agriculture and of the Interior to sell timber to specified groups of private purchasers without the purchasers participating in competitive bidding, 16 U.S.C. §§ 583a, 583b (2000), the act identifies the sales as agreements made

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(...continued)
H.R. Conf. Report No. 106-948, supra.

[10] In implementing this statute, the Small Business Administration states that there is a presumption that American Indians are socially disadvantaged. 13 C.F.R. § 124.103(b) (2001).

[11] BIA has been delegated the authority under this act, which uses it to set aside BIA procurements for Indian-owned concerns. See Means Constr. Co. and Davis Constr. Co., a joint venture, B-187082, Dec. 14, 1976, 76-2 CPD ¶ 483 at 2-3.

"without competition."[12] 16 U.S.C. § 583d. We are aware of no statute which uses the term "without competition" to include limited competitions.[13]

Another factor in determining the persuasiveness of an agency's interpretation is to consider its consistency with prior interpretations of the statute. Mead, 121 S. Ct. at 2171, 2176. Here, this is the first time the provision in question appeared in USDA's annual appropriation. However, the agency has essentially interpreted the language in two different ways within the context of the Act. When contemplating the purchase of live bison, the agency restricts the acquisition to Native American sources without competition; in that case, the agency interprets the statute to mean that it has authority to exclude non-Native American sources from those purchases and to conduct the acquisition without competition. However, when buying bison meat to blend with the Native American bison meat from live bison, USDA interprets the statute to mean that it has the authority to include non-Native American sources and to conduct a limited competition that will result in the bulk of the bison meat funded by the appropriation being obtained from non-Native American sources. The agency's interpretations are inconsistent and, as noted earlier, we are unable to square the latter interpretation with the plain language of this statute.

USDA nevertheless contends that Congress's intent to include all cooperative organizations, not only Native American organizations, is apparent from the statements of individual Congressmen in letters sent to USDA after enactment of the appropriations legislation (one after the filing of the agency-level protest). The agency acknowledges that these post-enactment statements are not legislative history per se, but insists that the provision at issue is obscure and thus the post-enactment statements, though not dispositive, should be given some weight in determining the intent of Congress at the time of enactment.

Generally, post-enactment statements by members of Congress are not persuasive evidence of congressional intent at the time of enactment unless accompanied by other types of evidence that corroborate the intent at the time of enactment, or

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[12] In another example, the Merchant Marine Act requires the Secretary of Transportation to establish a competitive selection process for the appointment of cadets to the United States Merchant Marine Academy, but also allows the Secretary to appoint a limited number of cadets "without competition" in order to further such goals as achieving a national demographic balance at the Academy. 46 App. U.S.C. § 1295b(b)(2)(A), (3)(D) (1994).

[13] The Competition in Contracting Act of 1984 does not use the term "without competition"; it uses the term "noncompetitive procedures" and "other than competitive procedures" to refer to exceptions to requirement for full and open competition; noncompetitive procedures include limited competitions. 41 U.S.C. § 253(c), (e) (1994).

where there is absolutely nothing else from which to determine intent. Pittston Coal Group v. Sebben, 488 U.S. 105, 118-19 (1988) (such statements could not possibly have informed the vote of the enacting legislators); GAO, Principles of Federal Appropriations Law, vol. 1, at 2-69 to 2-70. Here, as apparent from our prior analysis, there is no corroborating evidence to support a conclusion that the post-enactment statements here show that the enacting Congress intended to include all cooperative organizations as sources of bison to be purchased with the earmarked funds. Thus, we do not consider the letters from individual legislators as authoritative evidence of the intent of Congress at the time of enactment.

In sum, whether one looks to the clear and unambiguous meaning of the language of the statute, or turns to extrinsic evidence for the intent of Congress, we find the plain meaning of the language in the statute holds fast--the agency must purchase bison without competition and only from Native American sources.

We recommend that the agency cancel the RFP and purchase bison from Native American sources consistent with the Act and this decision. To the extent the agency needs to further process the bison purchased from Native American sources in order to deliver it to FDPIR participants, it may acquire these processing services under appropriate competitive procedures using otherwise available operating appropriations (including this earmarked appropriation); however, the agency should not use the funds earmarked for this purchase of bison to purchase or process bison acquired from non-Native American sources. We also recommend that USDA reimburse the protester its costs of pursuing this protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d) (2001). The protester should submit its certified claim for costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel